BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

OPINION OF COURT OF APPEALS.

The opinion of the Circuit Court of Appeals, Eighth Circuit, is reported in 125 F. 2d 229, and is set out on pages 196 to 210 of the record filed herein. The subsequent per curiam opinion of the Court of Appeals on the petition for a rehearing is set out on page 223 of the record.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals, Eighth Circuit, affirming the judgment of the District Court for the Eastern District of Missouri, was entered on January 27, 1942 (R. p. 209), and the petition for rehearing was denied on March 7, 1942 (R. p. 223). Thirty days' stay of mandate was granted on March 18, 1942 (R. p. 224).

The following cases are believed to sustain the jurisdiction of this Court:

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 206;
Lyon v. Mutual Benefit H. & A. Co., 305 U. S. 484;
Erie R. R. Co. v. Tompkins, 304 U. S. 64;
Wichita Royalty Co. v. City National Bank of Wichita, 306 U. S. 103;
Equitable Life Insurance Co. v. Halsey, Stuart & Co., 312 U. S. 410;
Stoner v. New York Life Ins. Co., 311 U. S. 464;
Brisch v. Central R. R. of N. J., 312 U. S. 484, 486.

III.

STATEMENT OF CASE.

Under the heading A, in the petition *ante*, is a statement of the case so far as it is material to the consideration of the question presented, and in the interest of brevity is not repeated here.

IV.

SPECIFICATION OF ERRORS.

1. The holding of the District Court that under the decisions of the state courts of Missouri respondent's release was void and that respondent was not required to return to petitioner the sum of $1,500 paid to her for such release as a condition precedent to respondent's right to maintain an action against petitioner under the double indemnity benefit of said policy, is contrary to the law as declared by the Missouri courts in:

> Och v. Missouri, K. & T. Ry. Co., 130 Mo. 27, 46, 31 S. W. 962, 966;
> Reed v. John Gill & Sons Co., 201 Mo. App. 457, 462, 212 S. W. 43, 45.

2. The holding of the Court of Appeals that the suicide note left by the insured did not establish his sanity as a matter of law is not sustained by the Missouri law and is contrary to the holding in Gates v. Travelers Insurance Co. (Mo. App.), 218 S. W. 927.

3. The holding of the Court of Appeals that petitioner's refusal to pay the additional sum of $3,500 under the double indemnity of the policy was vexatious under Sec. 6040, R. S. Mo. 1939, and that the District Court had properly assessed a penalty of $350 and an attorney's fee of $1,000 against petitioner under that statute is not justified by, but is in conflict with, the interpretation placed upon

that statute by the Supreme Court of Missouri, in the following cases:

State ex rel. Gott v. Fidelity & Deposit Co., 317 Mo. 1078, 1095, 298 S. W. 83, 91;
Aufrichtig v. Columbian National Life Ins. Co., 298 Mo. 1, 16, 249 S. W. 912, 917.

4. The holding of the Court of Appeals that petitioner's appeal from the judgment of the District Court was taken merely for the purposes of delay and that petitioner was therefore liable, either under Section 1230, R. S. Mo. 1939, or under Sec. 31 of the Rules of the Court of Appeals, for an additional 10 per cent of the amount of the judgment of the District Court cannot be sustained under said statute and the construction so placed by the Court of Appeals on its Rule 31 under the facts of this case is violative of fundamental principles of justice.

Aetna Life Ins. Co. v. Kennedy, 301 U. S. 389, 395;
Chateaugay Iron Co., Petitioner, 128 U. S. 544, 553;
Louisiana v. Jack, 244 U. S. 397, 403;
McKee v. Rains, 10 Wall. 22, 26, 19 Wall. 860, 862.

V.

ARGUMENT.

I.

The Holding of the Circuit Court of Appeals That There Was No Bona Fide Dispute or Controversy Between the Parties at the Time of Respondent's Execution of the Release of All Claims Under the Double Indemnity Benefit of the Policy and That Therefore a Return to Petitioner of the Consideration Paid for That Release Was Not a Condition Precedent to Respondent's Right to Maintain an Action Against Petitioner on the Double Indemnity Benefit of the Policy, Is Not Sustained or Supported by the Missouri Law, But Is Contrary to the Law as Announced by the Courts of That State.

The Court of Appeals, in holding that there was no bona fide dispute or controversy between the parties at the time the release was executed, cites the following Missouri cases:

Yancey v. Central Mutual Ins. Assoc., 77 S. W. (2d) 149 (Mo. App.);
Crowder v. Continental Cas. Co., 155 Mo. App. 535, 91 S. W. 1016;
Fowler v. Mutual Ins. Assoc. (Mo. App.), 86 S. W. (2d) 946;
Enright v. Schaden (Mo. App.), 242 S. W. 89;
Berry v. Detroit Cas. Co. (Mo. App.), 300 S. W. 1026;
Sappington v. Central Mutual Life Ins. Assoc., 229 Mo. App. 222, 77 S. W. (2d) 140;
Price v. Cannon, 3 Mo. 453;
Barrett v. Kern, 141 Mo. App. 5, 121 S. W. 774;
Schreibner v. Central Mutual Life Ins. Co. (Mo. App.), 108 S. W. (2d) 1052.

In those cases, however, the asserted defense was either (1) that the policy had been procured by *fraudulent representations* in the application or (2) that liability under the policy was excluded by *an express exception or delimiting clause in an otherwise assumed liability*, or (3) that the policy had *terminated prior* to insured's death. Such a defense in an action to recover on the policy would, of course, be *an affirmative defense*, as to which the defendant would have the *burden of proof*, and absent any evidence of such defense, the plaintiff would be entitled to a *directed verdict*.

In the case here, however, the dispute which was compromised and released did not involve any such claim or assertion. Petitioner asserted *no affirmative defense*. It merely *denied* that insured's death was accidental. As to this the *plaintiff* had the *burden of proof*. In other words, the controversy here concerned plaintiff's *right of recovery* under a contract *which only insured against an accidental death*, as to which the *burden of proof* was on the claimant. It had naught to do (as in the Missouri cases cited by the Court of Appeals) with a *defense* of *misrepresentation* in the procurement of the policy or with a clause *excluding* or *delimiting* liability in particular exigencies or that the policy had terminated prior to insured's death.

The distinction between the cases relied on by the Court of Appeals and a case of the character here involved is succinctly pointed out by the Missouri Supreme Court in Griffith v. Continental Casualty Co., 290 Mo. 455, 461, 235 S. W. 83, 85, where the Court, in an action *on an accident* policy, said:

> "The answer averred that his death 'was due to suicide and self-destruction.' This averment *was equivalent* merely to *a denial* that the insured's death was caused through *accidental* means by *accidentally*

falling out of a window. It did *not assert* that his death came *within some exception* of the *policy* for which defendant was not liable; *nor* did it *tender* an *affirmative defense* in *any sense. If the petition* in properly declaring on the policy had *predicated liability merely* on the *death* of the insured, and the defendant had by its answer *sought* to limit its liability under the policy by setting up a particular manner of death, the answer would *to that extent* have set up an *affirmative* defense. But it was *necessary* for the *petition* to allege, as it *did,* that the insured's death was caused by *accidental means,* and, as stated, the answer *denied* that it was so caused, with an incidental admission of liability to the extent of $1500 on the ground that insured had committed suicide. *The issue* would have been *just* the *same* had the answer been a *general denial.*"

The claim which respondent asserted under the double indemnity benefit of this policy when the release was executed was that insured's death was *accidental* because it was the result of an *insane suicide.*

If there had been no release and respondent had instituted an action on the double indemnity benefit of the policy, she would, under the Missouri law, *have had the burden of proving that the insured was insane* [Scales v. National Life & Acc. Ins. Co. (Mo. Sup.), 212 S. W. 8, 9; Fendler v. Roy, 331 Mo. 1083, 1094, 58 S. W. 2d 459, 464; Griffith v. Continental Casualty Co., 290 Mo. 455, 462, 253 S. W. 1043; Rubinstein v. New York Life Ins. Co. (Mo. Ap.), 153 S. W. 2d 760; Laventhal v. New York Life Ins. Co. (D. C., Mo.), 40 F. Supp. 157].

Since *respondent,* in an action to recover the accidental death benefit of the policy, *would have had the burden of proving* that the *insured was insane* when he killed himself, and since *that issue* would have been *for the determination of the jury,* it necessarily follows that *respond-*

ent's right of recovery would have *depended on* the *finding* of *the fact of insanity* by *the jury.* Until evidence of insured's insanity was introduced and the *finding made,* it could not possibly be foretold WHAT WAS THE FACT. In view of the *presumption of sanity,* how can it possibly be held, when the parties *compromised* this claim, that there was *no doubt* of petitioner's liability on the claim made? If there was such doubt, the compromise and release was justified. Both parties recognized this inherent doubt and so compromised the claim. Any claim which involves an issue of fact determinable only, as here, by evidence *in pais,* and by the verdict of a jury, can *never be said to be so free from doubt* that a *compromise* and *release* of the claim *is invalid.*

Respondent, unwilling to risk the entire sum of $5,000 payable under the double indemnity benefit upon her ability to satisfy a jury that the insured was insane when he suicided, accepted $1,500 in settlement of that claim. The Court of Appeals in permitting respondent to ignore that settlement and to recover on a claim previously released, while still retaining the consideration paid therefor, failed to follow the law as previously declared by the Missouri Supreme Court in Och v. Missouri, K. & T. Ry. Co., 130 Mo. 27, 46, 31 S. W. 962, 966, in which the Court said:

> "If the money received by Mrs. Och was in consideration of a settlement of all injuries which might result to her in consequence of the accident, the *retention of it* after it became known to her that the release was obtained through fraudulent representation, and after she had decided to sue therefor, *and to ignore said settlement,* was as *inconsistent with justice and fair dealing* as was the conduct of defendant's agent in obtaining from her a release through fraud and deceit, if such was the case. * * *
>
> "The *law* will *not permit plaintiff* to *retain the fruits* of the *settlement* and at the *same time ignore it* as if obtained by fraud. It will *not permit her to re-*

tain the money she received under the contract of settlement if in satisfaction of her entire claim and *yet proceed in disaffirmance* thereof (cases). *Until repudiation* of *the contract* of *settlement plaintiff had no cause of action.* Under such conditions 'something must then be *done* by the party defrauded *before* the *contract can cease* to *be binding;* so that it is specific performance reversed, the literal undoing * * * of the contract.' 1 Bigelow, Fraud, p. 74; * * *.

"*Settlements* and releases apply *alike* to all kinds of claims, whether arising *from contract or tort.* There can be no reason why it should not be so, and the authorities which hold to the contrary cannot be sustained on reason or authority."

The holding of the Court of Appeals is likewise contrary to the holding in Reed v. John Gill & Sons Co., 201 Mo. Ap. 457, 462, 212 S. W. 43, 45, in which the Court said:

"But aside from and waiving all this, there is another reason which disposes of plaintiff's right to recover in this case, and that is *he did not put himself in a position to disavow* the *settlement* by *returning* or offering to return, the *fruits of the settlement before instituting the suit.*"

II.

The Suicide Note Left by the Insured Established His Sanity as a Matter of Law.

In the suicide note left by the insured he stated that the act which he was about to commit was "nobody's fault," and he also designated in that note the *priest* who was to perform the last religious rites, the undertaker who was to bury his body, and the cemetery in which his body was to be interred. In Missouri an insured is insane when he is unable to appreciate the moral consequences of his act (Rodgers v. Travelers Insurance Co., 311 Mo. 249, 278 S. W. 368).

With respect to this note the Court of Appeals said (R. p. 208):

> "The circumstances of the writing were insufficient to raise any reasonable doubt as to the insanity."

With all due respect to the Court of Appeals, we submit that this was an insufficient answer.

This note shows that the insured knew and understood that his life was about to terminate *by his act* and at the very moment of committing "self murder" he says in that note that it was nobody's "fault," thus using the appropriate term "fault" as understood by everyone, which is a failure to do what is right or a transgression of the *moral law.* The lexicographers generally so define fault and in its relation to morals give no other definition.

Therefore, this note discloses emphatically and uncontrovertibly that the insured understood, and quite well understood, the moral as well as the physical consequences of the act which he was about to commit and did commit. So to understand evinces sense, *not madness*—else the whole world has gone mad.

In Gates v. Travelers Insurance Co. (Mo. Ap.), 218 S. W. 927, the Court held that a suicide note left by the insured established his sanity as a matter of law at the time he killed himself and the holding of the Court of Appeals in the case at bar that the suicide note did not raise any reasonable doubt as to insured's insanity cannot be sustained under the holding of the Missouri court in the Gates case. It is true that the Court in the Gates case held that the test of the insured's insanity was his ability to appreciate the physical consequences of his act, whereas the Missouri Supreme Court in the subsequent case of Rodgers v. Travelers Insurance Co., supra, held that the proper test of insanity was the ability of the insured to appreciate the moral consequences of his act, but the suicide note

in the case at bar shows that the insured appreciated *both the physical and the moral consequences* of the act he was about to commit.

III.

The Holding of the Court of Appeals That the District Court Properly Imposed a Penalty and Attorney's Fee Upon Petitioner Because Its Refusal to Pay the Balance Claimed to Be Due and Owing by It Was Vexatious Under Section 6040, R. S. Mo. 1939, Is in Conflict With the Decisions of the Missouri Courts.

Sec. 6040, R. S. Mo. 1939, provides as follows:

> "In any action against any insurance company to recover the amount of any loss under a policy of fire, cyclone, lightning, life, health, accident, employers' liability, burglary, theft, embezzlement, fidelity, indemnity, marine or other insurance, if it appear from the evidence that such company *has vexatiously refused to pay such loss*, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed ten per cent on the amount of the loss and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict."

The Court of Appeals justifies the District Court in finding that defendant's refusal to pay the amount sued for by respondent was vexatious under this statute.

No Missouri case holds that a release is void in a case of claimed liability under an *accident* policy where liability is denied on the ground that the insured's death was not within the contracted coverage, i. e., was *not accidental*.

No Missouri case holds that a release is void in a case of claimed liability under an accident policy on the ground that the insured's death was the result of an insane suicide where the proof of insanity rests *in pais*.

No Missouri case holds that the return of the consideration paid to the beneficiary for the release of her claim under an accident policy on the ground that the insured's death was the result of an insane suicide was not required as a condition precedent to her right to maintain a subsequent action to recover on the policy.

No Missouri case holds that a suicide note left by the insured, which shows his intent to commit suicide and an appreciation and understanding of the wrongfulness of the act which he was about to commit, is not indisputable evidence of his sanity.

A contest by petitioner of its liability for the additional sum of $3,500.00 claimed to be due and owing by it under the double indemnity benefit of the policy was, we submit, justified and warranted under one or all of the foregoing grounds. In any event, a lawyer would be reasonably justified and warranted in advising petitioner to contest, on one or all of the foregoing grounds, the claim against it for the additional $3,500.00 under the double indemnity benefit of said policy *in view of the absence of any controlling decisions in Missouri holding that* a contest of liability was not justified on any of these grounds. If so, then under the construction placed upon Sec. 6040, R. S. Mo. 1939, by the Missouri courts, the refusal of petitioner to pay the additional sum of $3,500.00 under that statute was not vexatious and it was improper for the District Court to assess against petitioner the statutory penalty and attorney's fee which it did assess.

In State ex rel. Gott v. Fidelity & Deposit Co., 317 Mo. 1078, 1095, 298 S. W. 83, 91, the Court said:

> "The legal questions raised by the respondent's position were such *that lawyers might well differ honestly* and *reasonably, thereon.* In these circumstances it *was error to submit the question of vexatious delay.*"

If petitioner had declined to pay anything in settlement of the claim under the double indemnity benefit of the policy, and respondent had sued to recover the full amount of that benefit, charging that insured's death was due to an *insane suicide*, then the District Court, under the holding of the Missouri Supreme Court in Aufrichtig v. Columbian National Life Ins. Co., 298 Mo. 1, 249 S. W. 912, *could not have found that the refusal to pay* was vexatious. The Aufrichtig case was an action to recover under an accidental death benefit of a life insurance policy on the ground that insured's death was the result of an *insane suicide*. The Missouri Supreme Court, despite an adverse judgment against the company in the trial court, held that the company *had* a *right* to *contest* plaintiff's claim *without penalty*, and that the trial court erred in assessing against the company a penalty (damages and attorney's fees) under what is now Section 6040, R. S. Mo. 1939. The Court said (298 Mo., l. c. 16, 249 S. W., l. c. 917):

> "In the case before us there was the single issue of fact whether or not self-destruction of the deceased was done *while sane or insane*. The record of evidence discloses *no bad faith* in *contending* that deceased was *sane* at the time. It will *not do* to say that insurance companies acting in good faith may not contest either *an issue of fact* or an *issue of law without subjecting itself to the penalties of the statute supra.*"

If contest of the whole amount in such case is justified and so precludes the assessment of damages and attorney's fees, then how could the Court of Appeals justifiably uphold the allowance of damages and attorney's fees when this action was for the recovery of less than the whole amount? Under the holding of the Court of Appeals an insurer which *settles* and *compromises* a claim under an accident policy in Missouri *lays itself open* to *greater pains and penalties in a subsequent action to recover* the

balance claimed to be due on the policy than it would have *incurred if it had* disclaimed *all liability under* the policy and *had refused* to settle and compromise the claim.

We submit that the holding of the Court of Appeals in this case is contrary to the holding of the Missouri Supreme Court in the Gott and Aufrichtig cases, supra.

IV.

The Imposition by the Court of Appeals of Additional Damages Against Petitioner of 10 Per Cent of the Amount of the Judgment of the District Court on the Ground That Petitioner's Appeal From That Judgment Was Vexatious and Was Taken Merely for the Purposes of Delay, Is Neither Justified by Sec. 1230, R. S. Mo. 1939, nor by Rule 31 of the Court of Appeals.

The Court of Appeals undertakes to justify the imposition against petitioner of the additional 10 per cent of the amount of the judgment of the District Court on the ground that its appeal from the judgment of the District Court was vexatious and was taken for the purpose of delay, either under Sec. 1230, R. S. Mo. 1939, or under its Rule 31.

Sec. 1230, R. S. Mo. 1939, provides:

> "Upon the affirmance of any judgment or decision, or upon the dismissal of any case, the supreme court and courts of appeal may award to the appellee or defendant in error such damages not exceeding ten per cent of the amount of the judgment complained of as may be just, and when such judgment shall be affirmed for part of the sum for which judgment was rendered by the trial court, such part of said judgment shall bear lawful interest from the date of the rendition of the original judgment in the trial court."

Manifestly, however, the Missouri Legislature has no constitutional power to prescribe a penalty *for a vexatious*

appeal from a judgment of a *District Court of the United States. Only Congress has any such power.*

In Chateaugay Iron Co., Petitioner, 128 U. S. 544, 553, the Court said:

> "We are of the opinion that the practice and rules of the state court do not apply to proceedings in the Circuit Court *taken for the purpose of reviewing* in this court a judgment of the Circuit Court * * *."

In Louisiana v. Jack, 244 U. S. 397, 403, the Court said:

> "This claim cannot be seriously entertained in the face of the long time perfectly settled law that equity suits in federal courts and *appellate procedure in them are* regulated exclusively by *federal statutes* and *decisions unaffected by statutes* of the states."

In Aetna Life Ins. Co. v. Kennedy, 301 U. S. 389, 395, the Court said:

> "The Conformity Act does not extend to the Circuit Court of Appeals."

The holding of the Court of Appeals, in so far as it undertakes to justify the imposition of this additional penalty for a vexatious appeal by Section 1230, R. S. Mo. 1939, is squarely in contravention of the foregoing decisions of this Court.

Rule 31 of the Circuit Court of Appeals, Eighth Circuit, provides:

> "2. In all cases where proceedings in this court shall delay the proceedings on the judgment of the inferior court, and shall appear to have been taken merely for delay, damages at a rate not exceeding 10 per cent in addition to interest, shall be awarded upon the amount of the judgment or decree."

We believe we have previously demonstrated that petitioner was justifiably entitled to a review by the Court

of Appeals of the factual, as well as the legal, issues involved herein without being subjected to further and additional penalties for so doing. *Especially* is this so when the Missouri courts have *not previously dealt with a case* involving a *compromise* and *settlement* of a *claim* under an *accident policy* on the ground of an *insane suicide.*

In McKee v. Rains, 10 Wall. 22, 26, 19 L. Ed. 860, 862, this Court held that damages should not be assessed on the ground that a writ of error was sued out merely for delay where, at the time the writ of error was sued out, there were no controlling decisions on the question at issue and said:

> "The counsel for the defendant in error asks, under the 23d Rule, that the order may be affirmed with damages at the rate of 10 per cent per annum on the amount of the judgment in the state court. If, upon the application for removal, the decisions of this Court recently made had been announced, there might be ground for argument that the writ of error had been sued out merely for delay. But it must be remembered that at the time of suing out the writ of error in this case, all questions settled by those decisions were seriously controverted.
>
> "We cannot say, therefore, that the writ of error was not prosecuted in good faith, and in the expectation of obtaining a reversal of the order."

The holding of the Court of Appeals in this case that petitioner's appeal from the judgment of the District Court was vexatious and was taken merely for the purpose of delay and that it was therefore liable for an additional 10 per cent of the amount of the judgment of the District Court, despite the fact that there was no controlling decision of the Missouri courts in a case involving the release of a claim under an accident on the ground that the in-

sured's death was the result of an insane suicide is, we submit, contrary to the holding of this Court in the McKee case, supra.

CONCLUSION.

In this case the Court of Appeals decided important legal propositions and ascribed thereto the attribute or appellation *that such is the law of Missouri.* Examination of the Missouri decisions cited by the Court of Appeals discloses that *they do not decide the law as announced by the Court of Appeals.* As the result of its erroneous conception or assumption of the law of Missouri, the Court of Appeals has debarred itself from deciding the questions involved, whereby petitioner has been deprived of a full review of the case which the law accords it. That this Court will issue its writ of certiorari under such circumstances is well settled.

> "The Rules indicate that the Court will *be persuaded* to grant certiorari where a Circuit Court of Appeals 'has decided an *important question* of *local law* in a way *probably* in *conflict* with *applicable local decisions.*' No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore *probably in conflict* with the *state law* as yet *unannounced by the highest court of the state.*"
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> Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 206.

Here petitioner has pointed out that which was omitted by petitioner in the Ruhlin case, i. e., that the law of Missouri, as announced by the Court of Appeals in the determination of *some* of the *questions* involved, is squarely *in conflict* with the pronouncement of the Court of Appeals, and that in the determination of *other questions* the

unannounced *law* of *Missouri* is *probably in conflict* with *the law as* announced by the Court of *Appeals in this case.*

To the same effect is Brisch v. Central Railroad of New Jersey, 312 U. S. 484, 486, in which the Court said:

> "We granted certiorari because of an alleged conflict *on a question of local law* between the *judgment below* and Miller v. Reading Company, 292 Pa. 44, 140 Atl. 618."

Respectfully submitted,

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